KOPERASI POS NASIONAL

v.

HAFSAH MOHD TAHIR

HIGH COURT MALAYA, KUALA LUMPUR
FAIZA THAMBY CHIK J
[ORIGINATING MOTION NO: R2-25-117-2001]
9 JULY 2002

ARBITRATION: *Arbitrator - Powers of arbitrator - Dismissal of employee - Whether could award damages when no damages applied for - Award of backwages - Whether an error of law - Whether remedy within domain of Industrial Court - Whether award to be set aside - Arbitration Act 1952 s. 24*

This was an application to set aside an award made by the arbitrator on the grounds that the arbitrator had acted beyond jurisdiction and that the award was, on the face of it, vitiated with errors of law. The facts were that the applicant had employed the respondent as its General Manager and had executed an Employee's Service Agreement dated 4 February 1991 ('the Agreement') for the purpose. Subsequently, by letter dated 29 June 1992, the applicant terminated the respondent's services after a domestic inquiry had found the respondent guilty of misconduct. The respondent disputed the legality of the dismissal, whereupon the matter of the termination was referred to arbitration. It was not in dispute that the Agreement was silent as to the right of the applicant to determine same with notice. It was also not in dispute that, before the arbitrator, the respondent was *inter alia* seeking for reinstatement, but not for damages, having regarded the latter relief as not an adequate remedy. This being the case, before the learned judge herein, questions arose as to whether the arbitrator had exceeded his jurisdiction when he ruled that: (i) since the notice period to dismiss the respondent was not stipulated in the agreement, a period of reasonable notice could not therefore be inferred; and (ii) the respondent was entitled to damages based on the total loss of backwages suffered by her as a result of the dismissal.

Held (allowing the application and setting aside the award):

[1] By making an award of damages when no such claim was made by the respondent in her pleadings and when she specifically submitted that she was not claiming for damages, the arbitrator had acted beyond his jurisdiction and on this ground alone the award made by the arbitrator could be set aside. (p 216 d)

[2] The arbitrator had contradicted himself by saying on the one hand that the agreement has no provision to allow for the termination of the respondent's contract of employment other than by way of dismissal for misconduct and suggesting on the other hand that if termination by reasonable notice is implied, this implied term would conflict with the express terms in the said contract of employment. Surely, in the event that there is no express provision in the contract to allow the applicant to terminate the respondent with notice, it would not conflict and would not be inconsistent with any express term of the contract of employment if reasonable notice of termination is implied into the contract of employment. (p 217 a-c)

[2a] The arbitrator's failure to recognise the principle of law that when no notice period is given, a reasonable notice period should be adopted as an implied term, constituted an error of law and therefore, a misconduct. In short, the arbitrator should have proceeded to hold that the applicant can terminate the services of the respondent by giving reasonable notice in the absence of a specific provision in the agreement providing for such termination with notice. (p 217 c-d)

[3] Bearing in mind *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan* and *Aetna Universal Insurance Sdn Bhd v. Ooi Meng Sua*, damages in a situation such as the present, must be limited to salary *in lieu* of proper notice. The arbitrator however did not deal with the issues in the award. The arbitrator had a misconceived view that since there was no mention of the applicant's right to terminate the respondent's services with proper notice in the agreement, no notice period should be implied. This finding is clearly against the law. (p 218 b-d)

[4] The arbitrator should have applied a reasonable notice period and not given "backwages" as he has done because, by so doing, he had acted on a basis where the law does not allow him to do. Backwages is a remedy only conferred to the Industrial Court. (p 221 a)

Case(s) referred to:

Aetna Universal Insurance Sdn Bhd v. Ooi Meng Sua [2001] 3 CLJ 1 CA ***(refd)***

D'Cruz v. Seafield Amalgamated Rubber Co Ltd [1963] 1 LNS 23 ***(refd)***

Ganda Edible Oils Sdn Bhd v. Transgrain BV [1987] 2 CLJ 394; [1987] CLJ (Rep) 95 ***(refd)***

Hartela Contractors Ltd. v. Hartecon JV Sdn Bhd & Anor [1999] 2 CLJ 788 CA ***(refd)***

Hodgkinson v. Ferrie [1857] 3 CBNS 189 ***(refd)***

Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and Other Appeals [1997] 1 CLJ 665 CA ***(refd)***

Quek Chek Yen v. Majlis Daerah Kulai [1986] 2 MLJ 290; [1986] 1 LNS 103 SC ***(refd)***

Rama Chandran, R v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 SC ***(refd)***

Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong [1998] 3 CLJ 503 FC ***(refd)***

Transfield Projects (M) Sdn Bhd & Anor v. Malaysian Airline System Bhd and Another Application [2001] 1 LNS 396 ***(refd)***

Legislation referred to:

Arbitration Act 1952, s. 24

Specific Relief Act 1950, s. 20(1)

Other source(s) referred to:

Halsbury's Laws of England, 4th edn, vol. 2 p. 334, para. 623

For the applicant - P Jayasingam; M/s Zul Rafique & Partners
For the respondent - Ramdhari JBS; T/n Lobo & Assocs

Reported by WA Sharif

JUDGMENT

Faiza Thamby Chik J:

The applicant's application as set out in encl. 1 is for an order under s. 24 of the Arbitration Act 1952 or alternatively under the inherent jurisdiction of the court that the award made between the parties to the Arbitration by Mr KP Gengadharan dated 28 September 2001 be set aside on the following grounds:

(a) That the award was beyond the jurisdiction of the arbitrator in that:

(i) the arbitrator had no authority to award damages when the relief sought by the respondent was for declaratory relief and specific performance of her contract of employment with the applicant;

(ii) that the arbitrator had no authority to award damages based on the total loss in terms of backwages the respondent suffered.

(b) That the award contained errors of law on the face of it in that in law the damages which the respondent would have been entitled to would be such damages as are just *in lieu* of proper notice and not such damages as awarded by the arbitrator;

(c) That the arbitrator misconducted himself or the proceedings in that in coming to the conclusion in the award that a term that the applicant can terminate the respondent's service by giving reasonable notice cannot be implied, the arbitrator decided on a point not argued or otherwise failed to give the applicant's proper opportunity of arguing the point; and

(d) That the costs of an incidental to this application may be paid by the respondent.

The respondent was a former member and employee of the applicant. By a letter dated 1 June 1990, the respondent tendered her resignation as member of the applicant with effect from 1 June 1990. (See p. 56 of encl. 2). By a letter dated 6 June 1990, the applicant offered to employ the respondent to the post of general manager of the applicant with effect from 4 June 1990. (See pp. 57 encl. 2). The respondent accepted the offer and both parties executed a formal employee's service agreement dated 4 February 1991. (See pp. 60 to 71 of encl. 2). It was a material term of the said contract of employment that the respondent may terminate the said service agreement as follows:

Termination by Notice

17. Notwithstanding anything contained or implied herein to the contrary the Employee may determine this Agreement at any time by giving to the Employer one month's notice in writing of the Employee's desire to do so and upon the expiration of such notice this Agreement shall terminate.

However, the said employee's service agreement was silent on the right of the employer to determine the said agreement with notice. By a letter dated 29 June 1992, the respondent's services were terminated after a domestic inquiry had found her guilty of the allegations of misconduct levelled against her. (See p. 148 of encl. 2). The respondent disputed the termination of her employment and by an Arbitration agreement dated 28 April 2000 made effective from 27 October 1998, the applicant and the respondent agreed to refer the dispute to the arbitrator. (See pp. 22 and 23 of encl. 2). At the arbitration the applicant and the respondent delivered and submitted the following pleadings and documents.

(i) Amended points of claim dated 15 February 2000. (See pp 25 to 32 of encl. 2);

(ii) Statement of defence dated 3 April 2000. (See pp. 34 to 40 of encl. 2);

(iii) Applicant's written submission dated 11 August 2000. (See pp 42 to 45 of encl. 2);

(iv) Respondent's written submission dated 29 August 2000. (See pp. 47 to 50 of encl. 2);

(v) Applicant's bundle of documents. (See pp. 52 to 148 of encl. 2);

(vi) Applicant's by-laws. (See pp. 250 to 214 of encl. 2);

(vii) Respondent's bundle of documents, (See pp. 216 to 241 of encl. 2);

(viii) Respondent's written submission dated 23 February 2001. (See pp. 243 to 259 of encl. 2);

(ix) Applicant's written submission dated 5 April 2001. (See pp. 261 to 267 of encl. 2);

(x) Respondent's written submission-in-reply dated 26 April 2001. (See pp. 269 to 273 of encl. 2).

The arbitrator after hearing the evidence of the parties and reading the submissions, handed down the award dated 28 September 2001. (See pp. 275 to 288 of encl. 2). By her amended points of claim, the relief sought by the respondent were, *inter alia*, as follows:

(1)(A) A declaration that the claimant was dismissed unlawfully and unfairly by the respondents on 29 June 1992;

(1) that the claimant be reinstated to the position of general manager without loss of benefits, monetary or otherwise;

(2) that the respondent pays to the claimant all arrears of backwages and allowances from date of dismissal to date of reinstatement to the last held position; and

(3) that the respondent pays all the following costs incurred by the claimant:

(i) Professional fee of the Arbitrator;

(ii) Administrative charges together with the charges for use of conference room;

(iii) Transport charges of the claimant;

(iv) And any further or incidental costs incurred by the Claimant in respect of this proceedings.

It should be noted that nowhere in the amended points of claim the respondent has sought the relief of damages. In fact in the respondent's written submission-in-reply dated 26 April 2001 found at pp. 269 to 273 of encl. 2, the respondent specifically states that the respondent's claim was not a claim for damages because damages was an inadequate remedy. Paragraph 3.3 of the said submission reads as follows:

3.3 In respect of paragraph 6.4 of the Respondent's submission, the Claimant submits that the relief sought by the Claimant was a declaratory relief that the dismissal was invalid and unfair. The cause of action in this case by the Claimant is not for wrongful dismissal. The Claimant did not claim

for damages because damages was an inadequate remedy. The Claimant also sought the remedy of an injunction in addition to the remedy of a declaration which in law will be refused if damages will be an adequate recompense, attached with Claimant's submission dated 29th August 2000). Therefore, the Claimant rightly could not and did not claim for damages.

The applicant in its statement of defence, states *inter alia* as follows:

21. In any event the respondent will state that if the termination of the Claimant's employment was unlawful, which is denied, the Claimant's only remedy is in damages, which in the present case would be 1 month's salary *in lieu* of the notice to terminate the Claimant's employment.

At the arbitration, the applicant and the respondent submitted on the power of the arbitrator to award the respondent the reliefs sought by her in her amended points of claim. The relevant portions of the award handed down by the arbitrator in this respect reads as follows:

Now for the relief. It was submitted on behalf of the claimant that the relief sought was a reinstatement to her former job in the Respondent Society together with backwages, etc .....

As a preliminary point the jurisdiction of the Arbitrator to order reinstatement was argued and submissions were made by both counsels .... Having heard the arguments and read the submissions made by the parties and the authorities in support thereof in this regard I am of the view that the Arbitrator in these proceedings cannot make an Award of reinstatement in view of the provisions of s. 20(1) of the Specific Relief Act ....

I find that these provisions exclude the remedy of reinstatement in cases of personal service ... .

In the circumstances, damages, for breach of contract is the appropriate remedy

Having held that the damages for breach of contract is the appropriate remedy, the arbitrator computed the damages based on the total loss terms of backwages that the respondent has suffered. The arbitrater in the award held as follows:

The Claimant's contract of service has no provision for termination of service other than dismissal for misconduct ... It is not possible to imply a term in the contract of employment that termination can be by reasonable notice if this implied term would conflict and be inconsistent with the express terms in the said contract.

.... I came to the conclusion that a term that the Respondent can terminate the Claimant's service by giving reasonable notice cannot be implied in this case because of the special circumstances and facts of the case.

> The total loss in terms of backwages the Claimant has suffered to date is about RM499,500.00
>
> As the Claimant did not seek to mitigate her damages I cannot award her full damages and in these circumstances I make an Award as follows:
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> (a) that the Respondent pay the Claimant a sum of RM270,000 as damages ...,

The issues before this court are as follows:

(a) Did the arbitrator act beyond his jurisdiction when he awarded the respondent damages for breach of contract when the relief sought by the respondent was for a declaratory relief and specific performance of her contract of employment and not for damages?

(b) Did the arbitrator act beyond his jurisdiction by awarding damages based on the total loss in terms of backwages the respondent suffered when, if at all, such damages for wrongful dismissal should be limited to damages as are just *in lieu* of proper notice?

(c) Did the arbitrator misconduct himself or the proceedings in coming to the conclusion in the award that a term that the applicant can terminate the respondent's service by giving reasonable notice cannot be implied?

The remedy sought by the respondent in her amended points of claim was basically for the remedy of specific performance (ie, reinstatement) and for arrears of backwages and allowances. There was no claim for damages. In fact as pointed out in para. 4.11, the respondent specifically submitted that she is not seeking the remedy of damages. The amended points of claim constitute the pleadings of the respondent and by making an award of damages, the arbitrator had departed from the pleadings and made an award in respect of an issue that was not before him. By so doing, the arbitrator acted beyond his jurisdiction. It is trite law that parties are bound by their pleadings. In the case of *Rama Chandran, R v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147; Mohd. Eusoff Chin, CJ held at p. 162 as follows:

> It is trite law that a party is bound by its pleading. The Industrial Court must scrutinise the pleadings and identify the issues, take evidence, hear the parties' arguments and finally pronounce its judgment having strict regard to the issues. It is true that the Industrial Court is not bound by all the technicalities of a civil court (s. 30 of the Industrial Relations Act 1967) but it must follow the same general pattern. The object of pleadings is to determine what are the issues and to narrow the area of conflict. The Industrial Court cannot ignore the pleadings and treat them as mere pedantry or formalism, because if it does

a so, it may lose sight of the issues, admit evidence irrelevant to the issues or reject evidence relevant to the issues and come to the wrong conclusion. The Industrial Court must at all times keep itself alert to the issues and attend to matters it is bound to consider.

In the arbitration case of *Transfield Projects (M) Sdn Bhd & Anor v. Malaysian* b *Airline System Bhd and Another Application* [2001] 1 LNS 396, KC Vohrah J (as he then was) as follows:

> An award, in order to be valid, must be final, certain, consistent and possible and must decide the matters submitted, and no more than the matters submitted: *Re Brown & Croydor Canel Co* [1839] 9 A & E 522; 8 LJQB c 92.

By making an award of damages when no such claim was made by the respondent in her pleadings and when she specifically submitted that she is not claiming for damages, the arbitrator had acted beyond his jurisdiction and on this ground alone, the award made by the arbitrator could be set aside. d

In his award, the arbitrator awards the respondent damages based on the total loss in terms of backwages suffered by the respondent as a result of her wrongful termination from service. He says that as there is no provision in the employee's service agreement for termination of the respondent's service e by the applicant other than by dismissal for misconduct, the applicant cannot imply a term in the contract of employment that the termination of the respondent by the applicant can be by way of reasonable notice. The relevant part of the award in respect of this issue is found at p. 287 of encl. 2 and for convenience, it is set out:

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> In the circumstances damages for breach of contract is the appropriate remedy. I do not accept the Respondent's submission that damages should be limited to 1 month's salary or at most 3 months' salary for the Claimant. The Claimant's contract of service has no provision for termination of service other than dismissal for misconduct. The contract of services provides that the g Claimant's employment is to continue up to retirement age or earlier termination in accordance with the provisions of the contract but there is no stipulation of this age in the contract. Further, no evidence was adduced during the Arbitration hearing of any retirement age being applicable to the Claimant. The contract of service only provided for termination of service by the Claimant by giving the Respondent one month's notice. Therefore, the parties h had put their mind together on the issue when the contract was formulated. It is not possible to imply a term in the contract of employment that termination can be by reasonable notice if this implied term would conflict and be inconsistent with the express terms in the said contract of employment.

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I think the Arbitrator appears to have contradicted himself. On the one hand he says that the employee's service agreement has no provision allow for the termination of the respondent's contract of employment other than by way of dismissal for misconduct and on the other hand the Arbitrator suggests that if termination by reasonable notice is implied, this implied term would conflict and would be inconsistent with the express terms in the said contract of employment. I think that in the event there is no express provision in the contract to allow the applicant to terminate the respondent with notice, it would not conflict and would not be inconsistent with any express term of the contract of employment if reasonable notice of termination is implied into the contract of employment. The Arbitrator's failure to recognise the principle of law that when no notice period is given, a reasonable notice period should be adopted as an implied term, is an error of law and therefore, misconduct. In the case of *Hartela Contractors Ltd. v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788, Gopal Sri Ram JCA in delivering judgment of the Court of Appeal held at p. 796 as follows:

> .... Or applying the wrong principles of construction, which the law does not recognize. Putting aside for a moment the reference in the foregoing passage to the erroneous construction of the statute in question, which may well be regarded either as an error of law on the face of the award or as misconduct, ...

In the case of *Ganda Edible Oils Sdn Bhd v. Transgrain BV* [1987] 2 CLJ 394; [1987] CLJ (Rep) 95, Syed Agil Barakbah SCJ in delivering the judgment of the Supreme Court cited with approval *Halsbury's Laws of England*, 4th edn, vol. 2 p. 334 para. 623 "Error of Law on face of award", as follows:

> An arbitrator's award may be set aside for error of law appearing on the face it, though the jurisdiction is not lightly to be exercised. Since questions of law can always be dealt with by means of a special case, this is one matter that can be taken into account when deciding whether the jurisdiction to set aside on this ground should be exercised. The jurisdiction is one that exists at common law independently of statute. In order to be a ground for setting aside the award, an error in law on the face of the award must be such that can be found in the award, or in a document actually incorporated with it, some legal proposition which is the basis of the award and which is erroneous.
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> If a specific question of law is submitted to the arbitrator for his decision and he decides it, the fact that the decision is erroneous does not make the award bad on its face so as to permit its being set aside; and where the question referred for arbitration is a question of construction, which is generally speaking, a question of law, the arbitrator's decision cannot be set aside only because the court would itself have come to a different conclusion; but if it appears on the face of the award that the arbitrator has proceeded

> illegally, as, for instance, by deciding on evidence which was not admissible, or on principles of construction which the law does not countenance, there is error in law which may be ground for setting aside the award.

The crucial issue on which the arbitrator erred is as follows: Where notice period to dismiss an employee is not stipulated then a period of reasonable notice cannot be inferred from within the clause is an error of law on the face because it is a principle of law, which the law does countenance. In short, the arbitrator should have proceeded to hold that the applicant can terminate the services of the respondent by giving reasonable notice in the absence of a specific provision in employee's service agreement providing for such termination via notice. The arbitrator correctly held that he cannot apply principles applicable to that of the Industrial Court which comes under the purview of the Industrial Relations Act 1967. He correctly applied the dicta of the Court of Appeal in the case of *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan and Another Appeal* [1997] 1 CLJ 665. The arbitrator however failed to appreciate that part of the judgment in full. Gopal Sri Ram JCA, in delivering the leading judgment of the court, made the very important point in his judgment, at pp. 702-703 which the arbitrator did not take into account and that is as follows:

> The former s. 20 conferred upon the Minister a discretion whether to refer the complaint of a non-union workman to the Industrial Court. Once referred, the Industrial Court could hear and adjudicate on the claim. If it came to the conclusion that there had been a dismissal which was without just cause or excuse, it could direct reinstatement - a remedy, as earlier observed, not readily available in the ordinary courts. Or, it could order the payment of reasonable compensation, which in monetary terms may, and often does, far exceed the meagre damages for breach of a contract of service recoverable at common laws.

This dicta emphasise that reasonable compensation is conferred by statute to the Industrial Court and is not applicable to any court. In the case of *Aetna Universal Insurance Sdn Bhd v. Ooi Meng Sua* [2001] 3 CLJ 1, the Court of Appeal restated this principle. In delivering judgment of the court, Gopal Sri Ram JCA, held at p. 5 as follows:

> We are here concerned with the position at common law. It is materially different from industrial law. In industrial law, for example, a workman may obtain specific performance of his contract of employment through an order of reinstatement. But the common law and the ordinary rules of equity working in tandem do not provide such relief, save in the rarest of cases. See *Francis v. Municipal Councilors of Kuala Lumpur* [1962] MLJ 407.

The common law governing the relationship of master and servant is clear. It is contained in the following propositions:

(1) A master is entitled to summarily dismiss his servant at any time, notwithstanding any contractual provision requiring the giving of notice of termination;

(2) If a dismissal is challenged, the burden is on the master to justify it: *SR Fox v. Ek Liong Hin Ltd* [1957] MLJ 1

(3) If the master fails to justify the dismissal, then he must pay the servant such damages as are just *in lieu* of proper notice.

In the light of the above, I am of the conclusion that damages in a situation such as that in our case, must be limited to salary *in lieu* of proper notice.

The arbitrator, however, did not deal with the issues in the award. The arbitrator has a misconceived view that since there was no mention of the applicant's right to terminate the respondent's services with proper notice in the Employee's Service Agreement, he is of the opinion that no notice period should be implied. This finding is clearly against the law. In the case of *Quek Chek Yen v. Majlis Daerah Kulai* [1986] 2 MLJ 290, Hashim Yeop A Sani SCJ (as he then was) in delivering judgment of Supreme Court held at pp. 293 and 294 stated as follows:

the only question left to be considered is whether the one month's notice given to the appellant is adequate notice. The appellant had served the Local Council for more than 19 years. In the matter of termination of employment under a contract of service it has generally been accepted that the higher the position held by the employee and the bigger is the salary the longer would be the notice required to put an end to the contract of service. Gill J (as he then was) decided that three months' notice in the case of an estate clerk with five to eight years' service would be adequate - *D'Cruz v. Seafiled Amalgamated Rubber Co Ltd* In *Francis v. Municipal Councillors of Kuala Lumpur (supra)* the Court of Appeal decided that the notice should be three months for an employee of seven years' service. In *Chiam Heng Hsien v. Jurong Town Corporation* the plaintiff was employed as an executive officer by the corporation and was confirmed in June 1972. In June 1976 it was found that he was in breach of certain provisions in the Jurong Town Corporation's Terms and Conditions of Service for taking up part-time employment elsewhere. After an enquiry he was found guilty of the charges and his service was terminated. He then filed a suit in the High Court for a declaration that he was still in the employment of the defendant corporation and entitled to be remunerated as such. Alternatively he claimed for damages for wrongful dismissal. His claim for the declaration was dismissed but the trial judge held that in regard to the circumstances of the case the proper sum to award would be three months' salary.

In the light of the above, it can be seen that the Supreme Court clearly stated that despite the lack of any notice provision in the contract of employment to allow the employer to terminate the contract with notice, there can be a reasonable period of notice invoked. In the case of *D'Cruz v. Seafield Amalgamated Rubber Co Ltd* [1963] 1 LNS 23, Gill J, applied this principle as follows:

> The case of *Payzu v. Hannaford* is an authority for the proposition that where there is a contract of hiring of a workman and nothing is said on either side as to any notice to be given to determine the contract, it is an implied term of the contract that it can be terminated only by either party giving a reasonable notice.
>
> Where the parties have not declared their intention as to notice, then the notice will be such as custom or usage was known to the parties at the time when the contract was made. The custom must be general and uniform, certain and reasonable in its terms, of reasonable antiquity and so notorious that persons would contract on the basis of its existence: see *Foxall v. International land Credit Co*. All these are questions of fact which must be proved by evidence although the Courts will take judicial notice of a custom which is well established in the Courts. Thus, there is a well established and judicially noticed custom in England that a domestic servant can be dismissed at any time by a month's notice or by the payment by the master of a month's wages *in lieu* of notice, although in this country only 14 days' notice is required as provided by section 57 of the Employment Ordinance, 1956.
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> In the absence of any declared intention of the parties or custom, a contract of service can only be terminated by a reasonable notice. *Halsbury's Laws of England* (3rd Edition), Vol. 25 at page 490, para 945, states the position as follows:
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> > If no custom or stipulation as to notice exists, and if the contract of service is not one which can be regarded as a yearly hiring, the service is terminable by reasonable notice. If a servant is taken into employment subject to the drawing-up of a written contract of service which is never in fact drawn up, there is contract of employment for an unspecified period which is terminable by reasonable notice.
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> Indeed, custom and reasonable notice are closely lined to each other in the sense that what is customary is reasonable and that the law will not recognise an unreasonable custom. Thus, it is for the Court to say what length of notice is reasonable in any given case. Evidence adduced to prove custom which is not sufficiently strong to prove its universal acceptance may be excellent evidence upon which the Court may gauge what is reasonable, but each case must depend upon its own particular facts.

In the circumstances, the arbitrator should have applied a reasonable notice period and not given "backwages" as he has done because by so doing, he had acted on a basis where the law does not allow him to do. Backwages is a remedy only conferred to the Industrial Court. The arbitrator had wrongly applied the dicta in the case of *Sababumi (Sandakan) Sdn Bhd v. Datuk Yap Pak Leong* [1998] 3 CLJ 503. On the assumption that he was referring to the majority judgment of the court and the remedy given by the majority judgment of the Court it would clearly indicate that a notice period should have been implied. In his judgment, Peh Swee Chin, FCJ at pp. 532-533 sets out the principles on implied terms as follows:

> Reverting to the first type of implied term which is dependent on a court drawing an inference as explained above, there are two tests to fix the parties with such an intention, ie, that the parties must have intended to include such an implied term in the contract. The first test is a subjective test, as stated by MacKinnon LJ in *Shirlaw v. Southern Foundaries* [1926] 2 KB 206 at p. 227 that such a term to be implied by a court is 'something so obvious that it goes without saying, so that if, while the parties were making their bargain, an officious bystander were to suggest some express provision for it in the agreement, they would testily suppress his with a common "Oh, of course".
>
> The second test is that the implied term should be of a kind that will give business efficacy to the transaction of the contract of both parties. The test was described by Lord Wright in *Luxor (Eastbourne) Ltd & Ors v. Cooper* [1941] AC 108 at p. 137, that in regard to an implied term, '... it can be predicated that "It goes without saying", some term not expressed but necessary to give the transaction such business efficacy as the parties must have intended'. Business efficacy in my opinion, simply means the desired result of the business in question. Thus, in *Shirlaw*'s case, Shirlaw who was appointed the managing director by the defendant company for 10 years, sued for and obtained damages for breach of agreement. It was held that it was an implied term that the defendant company would not alter its articles of association to create a right for itself to remove the plaintiff before the 10 year term expired. The implied term inferred by the court there was to let both parties achieve the desired result that the post of the managing director would continue to be available for 10 years to Shirlaw as both parties must have intended it at the time when making the agreement.
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> The testy answer to the question of the officious bystander of "Oh, of course", spoken of by Mackinnon LJ was described equally by Scrutton LJ in *Reigate v. Union Manufacturing Co (Ramsbottom) Ltd. & Anor* [1918] 1 KB 592 at p. 605 as '... of course, so and so will happen, we did not trouble to say that, it is too clear'.

The same views are also set in the judgment of Zakaria Yatim, FCJ, at p. 547 as follows:

> In my view, when the parties were negotiating the agreement, they intended to give the joint venture agreement business efficacy for a period of 20 years.
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> The second element is the officious bystander test. When the agreement was being negotiated, the officious bystander would ask the following question:
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> > Betting and lotteries are Federal matters under item 4 of the Ninth Schedule of the Federal Constitution. What will happen if the Sabah Gaming Ordinance is repealed by a Federal Order and the Pool Betting Act, 1967 extended to Sabah?
>
> The parties who had the benefit of the advice of their lawyers would have answered 'Of course we know that. We have made some provisions in Cl. 11 with regard to the cancellation of the licence in different situations. We anticipate the changes in the law and there is no need to make any express provision in the agreement'.
>
> In my opinion, both elements have been satisfied. The Court of Appeal has erred on the issue of implied terms. I agree with my learned brother Peh Swee Chin FCJ that the decision of the High Court in implying a term in the agreement should be upheld.

It is, therefore my conclusion that the arbitrator had miscontrued the judgment and if he had correctly stipulated it, he would have come to the conclusion that it would have become incumbent upon him to imply a reasonable notice period.

The case of *Hartela Contractors Ltd v. Hartecon JV Sdn Bhd & Anor* [1999] 2 CLJ 788 applying *Hodgkinson v. Ferrie* [1857] 3 CBNS 189 stated that an error of law can be set aside within s. 24. In the circumstances, the award is hereby set aside with cost.